Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), generally prohibits any pension plan amendment which has the effect of eliminating or reducing a participant's early retirement benefit or a retirement-type subsidy with respect to benefits attributable to service before the amendment. The Seventh Circuit, expressly acknowledging its direct conflict with a 1998 decision of the Fifth Circuit, held that a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates the anti-cutback rule when applied to suspend the benefits of participants who retired before the amendment.

The question presented is whether a "suspension" of early retirement benefits pursuant to a multiemployer pension plan amendment is an "elimination" or a "reduction" of such benefits which would be prohibited by ERISA's anti-cutback rule.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Central Laborers' Pension Fund (the "Pension Fund") is a multiemployer employee benefit plan and trust and has no corporate affiliations.

Respondents

Respondents Thomas E. Heinz and Richard J. Schmitt, Jr., are participants in the Pension Fund.

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v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting Petitioner's judgment on the pleadings (App. 33a-45a) is unreported. The opinion of the Seventh Circuit Court of Appeals (per Williams, C.J., joined by Rovner, C.J. with Cudahy, C.J. dissenting), reversing (App. 3a-31a) is published at 303 F.3d 802. The order of the Court of Appeals denying Petitioner's motion to stay the mandate (App. 1a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on September 13, 2002. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Employment Retirement Income Security Act § 204(g), 29 U.S.C. § 1054(g):

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participants in a more than de minimis manner. The Secretary of the

Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

STATEMENT OF THE CASE

Petitioner (Defendant below) Central Laborers' Pension Fund (the "Pension Fund") is a multiemployer benefit plan within the meaning of § 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(37)(A). Subject matter jurisdiction in the District Court was premised upon 28 U.S.C. § 1331 and 29 U.S.C. § 1132. Respondents (Plaintiffs below) are participants in the pension plan.

Respondents were each 39 years old when they qualified for and began receiving a "service-only pension," which was available to Pension Fund participants of any age as long as they had earned 30 or more pension credits. Monthly payments under the service-only pension were equal to those available at normal retirement age (defined as age 65 by the plan), i.e., the benefit payments were not actuarially reduced to account for payments which began at an earlier age and which would continue for a longer period. The monthly benefit amount for each participant was calculated based on the contribution rates at which the participant's 30 pension credits were earned.

Under the terms of the plan, monthly benefit payments for those participants retiring prior to age 60, such as Respondents, were subject to suspension during periods in which participants worked in certain "disqualifying employment." When Respondents began receiving their benefits, the plan defined disqualifying employment for participants retiring before age 60 as employment:

in a job classification of any type specified and covered in a collective bargaining agreement or in any occu-

> pation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker). App. 4a.

After Respondents began receiving their monthly pension benefits, they continued employment as supervisors in the construction industry, which was not considered disqualifying employment under the existing definition. For two years Respondents received monthly pension benefits while they worked as construction supervisors. In 1998, pursuant to powers of amendment provided in the plan document and in reaction to the high rate of retirement among plan participants at very early ages, the trustees amended the plan to expand the definition of disqualifying employment (for participants retiring prior to age 53) to include work "in any capacity in the construction industry (either as a union or non-union construction worker)."[1] The disqualifying employment rules of the plan were intended to discourage both early age retirement and "double-dipping" whereby a retiree avails himself of retirement benefits but has not actually retired.

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[1] ERISA provides that certain suspension of benefit rules do not constitute a forfeiture of vested benefits proscribed by ERISA § 203(a), also cited as 29 U.S.C. § 1053(a). Specifically, § 203(a)(3)(B) provides that:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> . . . (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

There is no dispute that the Plan's suspension rules, both before and after the amendment, complied with § 203(a)(3)(B) and Department of Labor regulations. App. 6a.

The Pension Fund construed this amended definition to cover Respondents' work as construction supervisors. When Respondents continued work in such capacity after being notified of the amended rules, their monthly benefits were suspended.

Respondents sued the Pension Fund, and the parties submitted cross motions for judgment on the pleadings. On August 9, 2000, the District Court, relying on *Spacek v. Maritime Ass'n.*, 134 F.3d 283 (5th Cir. 1998), held that ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), does not apply to suspensions of early retirement benefit payments triggered by disqualifying employment. Additionally, the District Court held that the Pension Fund's interpretation of the amended disqualifying employment definition to include supervisory work was not arbitrary and capricious. Respondents appealed to the Court of Appeals on both issues.

On September 13, 2002, the Seventh Circuit reversed the District Court's decision in a 2-1 decision and remanded the matter for further proceedings. Judge Williams, writing for the majority, expressly rejected the Fifth Circuit's interpretation of the anti-cutback rule in *Spacek* and held that the plan amendment violated the anti-cutback rule. App. 3a-4a. Judge Cudahy vigorously dissented, stating:

> Though Judge Williams has put as persuasive a face as may be possible on the majority's opinion, I still find *Spacek* quite compelling. *Spacek*, it seems to me, presents straightforward and plausible arguments, not susceptible to rebuttal by the sometimes tortured contentions of the majority. App. 24a.

Acknowledging that its ruling was in conflict with the Fifth Circuit, the Court of Appeals (pursuant to Circuit Rule 40(e)) circulated the decision to all the members of the court in regular active service. A majority did not wish to hear the

case en banc with only one vote in favor of granting a rehearing en banc. On October 11, 2002, the Seventh Circuit denied Petitioner's motion to stay issuance of the mandate.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. First, the conflict between the Fifth and Seventh Circuits centers on one of ERISA's most important provisions, the anti-cutback rule, and frustrates ERISA's objective of establishing uniformity in the administration of pension plans; second, if left unresolved, the conflict will have significant adverse consequences for pension funds throughout the country; and, third, the Seventh Circuit's decision is incorrect and is at odds with the plain meaning of ERISA's anti-cutback provision.

I. THE CONFLICT BETWEEN THE CIRCUITS DEFEATS ERISA'S GOAL OF UNIFORMITY.

The Seventh Circuit's explicit rejection of the Fifth Circuit's decision in *Spacek* results in a direct conflict between the circuits on the proper interpretation of one of ERISA's most significant provisions, the anti-cutback rule. The opposing readings of this rule by the respective circuits frustrate ERISA's purpose to provide a single standard for the administration of benefit plans.

The decisions of this Court have repeatedly recognized ERISA's goal of establishing a uniform set of regulations for the administration of employee benefit plans. In considering ERISA's pre-emption provision, this Court has regularly acknowledged the importance of eliminating any inconsistency imposed on ERISA by any state or local regulation. The Seventh Circuit's conflict with the Fifth Circuit in the application of the anti-cutback rule creates exactly the kind of inconsistency in employee benefit matters which ERISA was designed to eliminate. In the wake of the Seventh Circuit's ruling, multiemployer pension funds that have contributing

employers and participants in both the Fifth and Seventh Circuits are faced with administrative complexities and inconsistencies that this Court has prohibited previously by its interpretation of ERISA's pre-emption provision.

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987), for example, this Court stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

482 U.S. at 11, 107 S.Ct. at 2217.

Similarly, in *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322 (2001), this Court stated:

> One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different states.

532 U.S. at 148, 121 S. Ct. at 1328.

If left to stand, the conflict between the Fifth and Seventh Circuits with regard to the anti-cutback rule will result in exactly the kind of balkanization of pension rules which ERISA was designed to prevent. The implications of this conflict for pension plans throughout the country are difficult to overstate.

II. IF LEFT UNRESOLVED, THE CONFLICT WILL ADVERSELY AFFECT PENSION PLANS THROUGHOUT THE COUNTRY.

The impact of the Circuits' conflicting interpretations of the anti-cutback rule will reach far beyond the parties in the instant case. As described below, the conflict between the *Spacek* and *Heinz* decisions will result in differences among pension funds in their ability to make plan amendments and will add complexity which Congress sought to avoid with a uniform administrative scheme.

A. The Circuits' conflict will result in disparate application of the anti-cutback rule.

The Fifth Circuit's decision in *Spacek* permits a pension plan to amend its disqualifying employment rules and apply the amendment to suspend the early retirement benefits of retirees who engage in such employment, holding that a "suspension" is not an "elimination" or a "reduction" of benefits proscribed by ERISA's anti-cutback rule. The Seventh Circuit, however, with its decision in the instant case, not only prohibits such an amendment and its application but goes even further by holding that any amendment which places "materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." App. 9a. In the wake of these two decisions, plan administrators and trustees are left facing a decidedly uneven playing field and a patchwork regulatory scheme which ERISA was designed to prevent.

Assume, for example, that the financial integrity of a multiemployer pension fund is jeopardized because of unexpectedly high retirement rates. If the fund is located in Texas, the trustees of the fund, in the interest of all its participants, may rely on the Fifth Circuit's ruling in *Spacek* to expand its disqualifying employment rules as to early retirement benefits for current retirees. Given the Seventh

Circuit's ruling in the instant case, however, a pension fund located in Illinois would not be able to take the same protective measures. Clearly, such a disparate result is completely inconsistent with ERISA's goal of uniformity.

The consequences of an unresolved split between circuits are even more significant for large pension funds that operate on a national scale or in numerous circuits. Consider, for example, the situation faced by a large multiemployer fund with administrative offices located in the Fifth Circuit but with contributing employers and participants in both the Fifth and Seventh Circuits. The administrator of such a fund faces the daunting task of properly applying the irreconcilable rulings of *Spacek* and *Heinz* in the administration of its plan. An even more complicated situation confronts a nationwide pension fund which has contributing employers and participants in the Fifth and Seventh Circuits, but whose administrative offices are located in a third circuit. Given the federal courts' broad construction of ERISA's venue provisions,[2] litigation would seem to be inevitable regardless of how the administrator attempts to apply these conflicting decisions to such a plan.

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[2] 29 U.S.C. § 1132(e)(2) provides an ERISA action ". . . may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." This jurisdictional language has merged the analyses of jurisdiction and venue whereby venue may be deemed appropriate in any district where service of process can be effectuated. ERISA's nationwide service of process language, read together with 28 U.S.C. § 1391(c) and minimum contacts criteria involved in traditional due process analysis, *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985), generally means that for ERISA actions, venue may be appropriate in any district in the United States. See, for example, *Medical Mut. of Ohio v. Desoto*, 245 F.3d 561, 567 (6th Cir. 2001); *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000); *Federal Fountain, Inc. v. KR Entertainment, Inc.*, 165 F.3d 600, 601-602 (8th Cir. 1999).

This Court has recognized that those charged with maintaining pension funds must coordinate complex administrative activities and that allowing a non-uniform scheme would introduce considerable inefficiencies in fulfilling those responsibilities. *Ft. Halifax*, 482 U.S. 1, 11, 107 S. Ct. 2211, 2217 (1987). The conflict resulting from the decision below introduces just this sort of problem for plan administrators and trustees. Clearly, officials of nationwide pension plans should not be required to maneuver through such starkly disparate readings of one of ERISA's most significant provisions.

B. The Seventh Circuit has created an "anti-amendment" rule that imposes a vague and uncertain standard.

The majority's opinion converts the anti-cutback rule into a wholesale "anti-amendment" rule. The majority effectively holds that in order to impose limitations on re-employment, a plan must apply those limitations not by amendment but by "a pre-existing plan provision" in the plan as "originally conceived." App. 20a. Such a construction unduly constricts the flexibility of plans to amend their provisions to address exigencies, including "double-dipping" which can affect the financial integrity of a plan even in good economic times. App. 28a, n2.

The Seventh Circuit's opinion also interprets the anti-cutback rule as a prohibition against amendments "placing materially greater restrictions on the receipt of the benefit . . . ." App. 9a. If this interpretation stands, then plan trustees will be constrained from protecting and preserving by amendment the fiscal integrity of the funds they administer for fear that litigation—in the face of allegations of proscribed cutbacks—will be required in order to determine whether the amendment constitutes a "material" change in conditions for the receipt of benefits. The potential disparate interpretation of "materiality" among circuits fundamentally

threatens the integral uniformity of ERISA and will chill the powers of trustees to meet the unforeseen effects of past trust policy regarding disqualifying employment.

The comment by the majority in *Heinz* (App. 15a) that "[w]e do not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary" inadequately addresses the issue and begs the question. A unanimous panel of the Fifth Circuit Court of Appeals in *Spacek*, as well as Judge Cudahy, opined that the omission of a specific reference to "suspensions" in the legislation, coupled with the consistent evidence of legislative history, Treasury regulations, and other case law, leads to the conclusion that a suspension of benefits was not intended to trigger the anti-cutback rule. In making its plan amendment, Petitioner reasonably relied upon the plain meaning of the anti-cutback rule as recognized in *Spacek*. The Seventh Circuit's ruling replaces plain meaning with a "materiality" standard which is vague and uncertain, at best, making plan administration more difficult and unpredictable.

III. THE SEVENTH CIRCUIT'S DECISION INCORRECTLY DISREGARDS THE PLAIN MEANING OF THE ANTI-CUTBACK RULE.

The Fifth Circuit's analysis of the anti-cutback rule in *Spacek* relies on straightforward interpretations of statutory and regulatory language. As Judge Cudahy in his dissent explains, the majority seeks to refute this analysis "with implausible and unconvincing arguments that do violence to the clear intent of the drafters." App. 31a. In Judge Cudahy's opinion, the three bases upon which *Spacek* rests have not been persuasively refuted by the majority in this case. Petitioner addresses each in turn.

A. The statutory language—a "suspension" is not a "reduction."

The Fifth Circuit in reviewing the plain meaning of the language of the anti-cutback rule concluded that it prohibits the "reduction" of benefits not their "suspension," a term which is wholly absent from the language of the rule. As noted in *Spacek* and by Judge Cudahy in his dissent in *Heinz*, "suspend" or its variants are used side-by-side with "reduce" or its variants in many sections of ERISA. The majority of the Seventh Circuit panel considering this case argued that "reduction" includes "suspension." For this interpretation to be correct, however, the use of "reduce" or its variants and "suspend" or its variants within the other sections of ERISA would be redundant. This in turn does violence to the basic tenet of statutory construction that each term must be given meaning. See *Spacek*, 134 F.3d at 289, citing *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 506, 133 L.Ed.2d 472 (1995). Judge Cudahy agreed, stating: "There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so. I find this plain meaning argument [approved in *Spacek*] to be quite convincing." App. 24a.

The plain meaning construction in *Spacek* is supported by the Sixth Circuit case of *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), wherein the Court noted that 29 U.S.C. § 1054(g) did not apply to an amendment allegedly expanding restrictions on post-retirement employment because "suspension" was not a "reduction or elimination" of benefits. While the majority below dismissed this observation by the Sixth Circuit as *dicta* and because it lacked analysis, Judge Cudahy in his dissent surmised that the absence of analysis for such conclusion in *Whisman* was because of its obviousness within the plain meaning of the anti-cutback rule. App. 27a.

B. The applicable legislative history is consistent with the Fifth Circuit's plain meaning interpretation of the anti-cutback rule.

The *Spacek* decision relies next on the legislative history, to wit: the comments of Representative William Clay who introduced the House bill that became the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (the "REA"), which added Paragraph (2) to 29 U.S.C. § 1054(g), the "anti-cutback" rule. Representative Clay's remarks demonstrate support for the Fifth Circuit's plain meaning interpretation. In his dissent Judge Cudahy states that the Congressman's comment in the final House debates on the REA "appears to reflect an understanding at the time of the adoption of the anti-cutback rule that it did not apply to adjustments made by the plan (perhaps in the interest of the plan's financial integrity) to the rules involving suspension of benefits in the event of re-employment in the construction industry." Tellingly, the Fifth Circuit's reading of Representative Clay's remarks is consistent with 29 U.S.C. § 1053, with Treasury Regulation 26 C.F.R. § 1.411(c)-1(f), with *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), and with the current Internal Revenue Service guidance.[3] App. 22a. Judge Cudahy finds the majority's attempt to explain away Representative Clay's comment unconvincing; in particular, he deems the majority's general argument against the value of

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[3] See Multiemployer Plan Examination Guidelines ("Guidelines") Section 4.72.14, *et seq.* of the Internal Revenue Manual, issued May 4, 2001 (available on WEST-LAW RIA-IRM database). These guidelines provide technical guidance regarding multiemployer plans to the Service's Employee Plan field personnel who examine multiemployer plans and other technical staff (4.72.14.1). Under Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713, the IRS was given authority over ERISA's funding, participation, vesting and benefit accrual provisions, including § 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6), the counterpart to ERISA § 204(g).

legislative history "less weighty in the case of legislative history that fits so closely with the interpretation founded on plain meaning." App. 26a.

C. The applicable regulations support the Fifth Circuit's interpretation of the plain meaning of the anti-cutback rule.

The conflict between the Fifth Circuit in *Spacek* and the Seventh Circuit in *Heinz* extends beyond interpretation of the anti-cutback rule and into the construction of the supporting Treasury Regulations applicable to the anti-cutback rule. Specifically, Treasury Regulation 26 C.F.R. § 1.411(c)—1(f)(1) and 29 C.F.R. § 2530.203-3(a) provide that suspension of early (albeit accrued) retirement benefits is not proscribed if the suspension "does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." *Spacek*, 134 F.3d at 290 n.8. The Fifth Circuit in *Spacek* concluded that these regulations indicated the power of pension benefit plans to suspend early retirement benefits upon reemployment is even broader than the power of such plans "to suspend retirement benefits available at normal retirement age." *Ibid.* The Seventh Circuit rejected such notion as contrary to the right of the pension recipient to receive the accrued benefits "unconditionally," citing 26 C.F.R. § 1.411(d)-Q & A-1. However, Judge Cudahy in his dissent asserts that the majority got it wrong (and Petitioner agrees) because "the bar against 'increasing conditions' [referred to in the Regulation] appears to be a bar against *eligibility* requirements for pension participation" [citing 26 C.F.R. § 1.411(d)-Q & A-6], rather than a bar against suspension based on reemployment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
October 11, 2002

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

Appeal from the United States District Court
For the Central District of Illinois
No. 99 C 1388
Joe B. McDade, Chief Judge

Before Hon. Ann Claire Williams, *Circuit Judge*

The following are before the court:

1. MOTION TO STAY ISSUANCE OF MANDATE, filed on September 27, 2002, by counsel for the appellee.

2. RESPONSE TO DEFENDANT'S MOTION TO STAY ISSUANCE OF MANDATE (REQUEST FOR A BOND/RULE 41(d)(2)(C)), filed on October 10, 2002, by counsel for the appellants.

IT IS SO ORDERED that #1 is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

JUDGMENT—WITH ORAL ARGUMENT

Date: September 13, 2002

BEFORE: Honorable Richard D. Cudahy, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*
Honorable Ann Claire Williams, *Circuit Judge*

Appeal from the United States District Court for the Central District of Illinois No. 99 C 1388, Joe B. McDade, Chief Judge.

The judgment of the District Court is REVERSED, with costs, and this case is REMANDED in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

Argued Feb. 12, 2001
Decided Sept. 13, 2002

Before CUDAHY, ROVNER, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*.

We are asked to decide whether a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), when applied to suspend the benefits of the plaintiffs, who retired before the amendment. The district court, relying on *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998), granted judgment on the pleadings in favor of the defendant pension fund. We reject the Fifth Circuit's interpretation of

29 U.S.C. § 1054(g) and hold that the amendment, which had the effect of reducing the plaintiffs' early retirement benefits, violates the anti-cutback rule.[1]

I. BACKGROUND

The facts are not in dispute. Plaintiffs Thomas E. Heinz and Richard J. Schmitt, Jr., are participants in a multi-employer pension plan administered by defendant Central Laborers' Pension Fund. Both plaintiffs, who were 39 years old when they retired in 1996, qualified for and began receiving monthly benefits payments under a "service-only pension," which was available to participants who retired at any age, so long as they had earned 30 or more pension credits. The monthly payments available under the service-only pension were the same as those available at normal retirement age—that is, the benefits were not actuarially reduced to take into account that payments began at an earlier age and would continue over a longer period. The monthly amount was determined based on the contribution rates at which the required 30 pension credits were earned.

Under the plan, monthly benefit payments for those retiring before age 60, like the plaintiffs, were subject to suspension for periods during which the participants worked in certain "disqualifying employment." At the time of plaintiffs' retirement, disqualifying employment was defined in the plan (for employees retiring before age 60) as employment:

> in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

[1] Because this opinion conflicts with the Fifth Circuit's decision in *Spacek*, it has been circulated pursuant to Circuit Rule 40(e) to all members of the court in regular active service. A majority did not wish to hear the case en banc. Judge Evans voted to grant rehearing en banc.

After their retirement, plaintiffs obtained jobs as supervisors in the construction industry, which was not disqualifying under the existing definition. For two years the plaintiffs worked as construction supervisors while collecting monthly pension benefits. Then, in 1998, the plan was amended and the definition of disqualifying employment was expanded to include (for participants who retired before age 53) work "in any capacity in the construction industry (either as a union or non-union construction worker)."[2] The Fund construed this amended definition as covering plaintiffs' supervisory work and suspended their monthly benefit payments.

The plaintiffs sued the Fund and, on cross motions for judgment on the pleadings, the district court entered judgment for the Fund. The district court, after careful analysis, held first, that the anti-cutback rule does not apply to suspensions of early retirement benefits payments triggered by disqualifying employment, and second, that the Fund's interpretation of the amended definition of disqualifying employment to include supervisory work was not arbitrary and capricious. The plaintiffs appeal on both grounds.

II. ANALYSIS

ERISA does not require employers to provide pension or early retirement benefits, or mandate a particular level of benefits. *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir.1992). Instead, "ERISA protects the benefits described in

[2] The amended plan distinguished between early retirement benefits that accrued before and after the amendment. For participants who retire before age 53, the amended definition of disqualifying employment quoted above applied to early retirement benefits that accrued before the amendment; benefits accruing after the amendment were subject to suspension for any kind of post-retirement work. (Amendment No. 7, Section 6.7(b) & (c).)

the Plan by ensuring that, if a pensioner is promised a benefit and fulfills the conditions required to receive it, the pensioner will actually receive the described and promised benefit." *Id.* at 469. ERISA protects benefits from forfeiture through detailed rules regulating vesting and accrual rates, which ensure the participant's right to receive promised benefits notwithstanding his or her consent to plan provisions that would otherwise require forfeiture. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 121-22 (3d ed.2000).

One limited exception to the non-forfeiture rules is that pension plans may contain provisions requiring the suspension of monthly benefit payments if a participant works in certain jobs after retirement. *See* 29 U.S.C. § 1053(a)(3)(B)(ii); ERISA § 203(a)(3)(B). Under this exception, multiemployer plans may provide for suspension of benefit payments if the retiree works "in the same trade or craft, and the same geographic area covered by the plan." *Id.* For early retirement benefits, plans may contain even broader limitations on re-employment, according to a Department of Labor regulation promulgated under ERISA § 203(a)(3)(B). *See* 29 C.F.R. § 2530.203-3(a). The plaintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions. Instead, they assert that the amendment, which expanded the scope of disqualifying employment, violated the anti-cutback rule of § 1054(g). We review de novo the district court's decision to grant judgment on the pleadings in favor of the Fund. *See Velasco v. Ill. Dept. of Human Servs.*, 246 F.3d 1010, 1016 (7th Cir.2001).

A. Plan Amendments Under 29 U.S.C. § 1054(g)

Plan amendments are permitted under ERISA, *see* 29 U.S.C. § 1102(b)(3), but an amendment may not decrease

benefits that have already accrued. *See* LANGBEIN & WOLK, *supra* at 160. According to paragraph (1) of the anti-cutback rule:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

29 U.S.C. § 1054(g)(1); ERISA § 204(g)(1).[3] "Accrued benefit" is defined under ERISA as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). This definition has been interpreted to include retirement benefits and to exclude "ancillary benefits not directly related to retirement benefits" like insurance or disability benefits, *see* 26 C.F.R. 1.411(a)-7; *Hickey*, 980 F.2d at 468, and some courts, relying on this definition, have held that early retirement benefits were likewise excluded. *See Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1359-60 (7th Cir.1993), *overruled by Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir.1996); *Bencivenga v. Western Penn. Teamsters and Employees Pension Fund*, 763 F.2d 574, 577-78 (3d Cir.1985).

Paragraph (2) of § 1054(g), added by the Retirement Equity Act of 1984, P.L. 98-397, makes clear, however, that early retirement benefits are within the protection of the anti-cutback rule. Under that new provision, the test is not whether the amendment decreases "accrued benefits," but

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[3] The two stated exceptions relate to cases of "substantial business hardship" (29 U.S.C. § 1082(c)(8)) and terminated multiemployer plans (29 U.S.C. § 1441). The Fund does not assert that either exception applies.

rather whether the amendment "has the effect of--eliminating or reducing" early retirement benefits attributable to service before the amendment:

> For purposes of paragraph (1), a plan amendment which has the effect of—
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> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
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> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

29 U.S.C. § 1054(g)(2); ERISA § 204(g)(2); *see Ahng,* 96 F.3d at 1036; *Arndt v. Security Bank S.S.B. Employees' Pension Plan,* 182 F.3d 538, 540-41 (7th Cir.1999).[4] There is no question that the benefits at issue here are "attributable to service before the amendment" because the plaintiffs had already retired when the plan was amended. The only question, then, is whether the 1998 plan amendment "has the effect of—eliminating or reducing" the plaintiffs' early retirement benefit.

Before the amendment, plaintiffs had the right under the plan to work as construction supervisors and continue to receive their monthly benefit payments. When disqualifying employment was redefined to include work "in *any capacity* in the construction industry (either as a union or non-union

[4] For simplicity, we will refer to the plaintiffs' benefit as an early retirement benefit, without intending any substantive distinction between that term and "retirement-type subsidies." (On the difference between the terms, see *Arndt*, 182 F.3d at 542; DAN M. MCGILL & DONALD S. GRUBBS, JR., FUNDAMENTALS OF PRIVATE PENSIONS, at 131-35 (Pension Research Council) (6th ed.1989), *reprinted in* LANGBEIN & WOLK, *supra,* at 447-48.)

construction worker)," and when the Fund applied that definition to supervisory work, the plaintiffs lost their right to work as construction supervisors while collecting benefits.

We conclude that plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of § 1054(g)(2). A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment. We have not before interpreted the prohibition in the anti-cutback rule as limited to amendments that reduce the amount of the periodic payment, and we find nothing in the language of the rule that suggests such an interpretation. In *Ahng*, for example, we held that the plaintiffs had stated a claim for violation of § 1054(g) when they alleged that a plan amendment changed the deadline by which the employee must retire in order to receive supplemental early retirement benefits. 96 F.3d at 1036-37; *see also Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir.2000) (plan amendment that changed eligibility requirements for early retirement benefits violated § 1054(g)). Similarly, in *Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-28 (9th Cir.2001), the Ninth Circuit held that an amendment that eliminated the plan's "no-offset rule," which had allowed a participant to receive full early retirement benefits without regard to the amount he already received upon previous retirement, violated § 1054(g) even though the amendment increased the plaintiff's monthly benefit payment. *Cf. Hickey*, 980 F.2d at 468 (7th Cir.1992) (plan amendment that eliminated the participant's right to cost-of-living adjustments violated the anti-cutback rule).

The Fund argues that these cases are distinguishable because a change in the eligibility requirements, as in *Ahng* for example, differs from a change in the conditions triggering suspension of benefit payments in that the former

permanently reduces benefits or eliminates certain participants' rights to benefits, whereas a suspension is temporary. We find the distinction unconvincing. Although with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment—the right to continue to work in the industry while receiving monthly benefit payments—and that loss was permanent.[5] In our judgment, this was a reduction of early retirement benefits within the plain meaning of § 1054(g)(2).[6]

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[5] We respectfully believe that our dissenting colleague, by describing post-retirement income as a "bonus," mischaracterizes and underestimates the value of this right to plan participants, who were entitled to count on that pay to supplement their pension. There are other sources of such income, but compensating for lost income is more difficult the closer one is to retirement (or as here, early retirement). Amendments that restrict post-retirement employment most harshly affect those nearing retirement and especially those who have already retired, who have foregone other income-producing options which require long-term planning (such as taking re-training classes or fortifying savings and investment accounts). In this way, the amendment's effect in this case is like any reduction of benefits attributable to service already performed—it disproportionately affects those with greater service.

[6] The Fund also asserts that the amendment was necessary to curb the practice of "double-dipping," which it claims was depleting fund assets. We note that the pre-amended plan already provided for suspension of benefits if the retiree resumed work in jobs for which contributions were made to the Fund, so it does not appear that the amendment was aimed at "double-dipping" in the sense of preventing a participant from accruing additional benefits while drawing a pension. In any event, the anti-cutback rule does not prohibit the Fund from curbing certain reemployment prospectively, that is, by using the new definition of disqualifying employment to suspend the portion of the benefit payment

B. *Spacek v. Maritime Association*

The Fund points out, however, that "suspensions" are not identified along with the prohibitions against decreases, reductions, and elimination of benefits in the anti-cutback rule. The Fund relies on *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998), in which the Fifth Circuit concluded that an amendment like the one in this case did not violate the anti-cutback rule because it concerned a "suspension" and not a "reduction" in benefits.[7] The Fifth Circuit supported its conclusion with: (1) an examination of the use of the two terms under the statute and related regulations; (2) the legislative history of the Retirement Equity Act; and (3) a

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attributable to service after the amendment. *Cf.* H.R.Rep. No. 98-655, Pt. 2 at 26-27 (1984); S.Rep. No. 98-575, at 29, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2575. But there is no question that at the time of plaintiffs' retirement, the plan permitted the very practice that the Fund now disparages—working as construction supervisors while receiving benefits. We can see no basis for inferring that Congress intended to exclude from the anti-cutback rule amendments based on claims of financial circumstances that fall short of the two exceptions identified in § 1054(g)—for cases of substantial business hardship and for terminated plans. *See Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir.1986) ("'the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.'") (quoting *In re Cash Currency Exchange*, 762 F.2d 542, 552 (7th Cir.1985)). The anti-cutback rule, by protecting benefits attributable to service already performed, assures that the relatively greater effect on retirees of any change is adequately weighed when determining how to deal with financial contingencies.

[7] The Sixth Circuit, in *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir.1995), also stated that § 1054(g) did not apply to an amendment allegedly expanding restrictions on post-retirement employment because a "suspension" was not a "reduction or elimination" of benefits. This statement, however, was dicta, because the court held that the plaintiff would have lost even under the pre-amendment version of the plan. *Id.* Moreover, the court did not support its conclusion with any analysis, so the opinion is not helpful to our task.

Treasury regulation concerning the effect of suspensions on "accrued benefits." We respectfully conclude, however, that the Fifth Circuit's arguments do not support its conclusion.

1. Suspensions and reductions under ERISA.

In *Spacek*, the court noted that "[t]hroughout the statute and corresponding regulations, the concepts of reduction of benefits and suspension of benefit payments are used in distinct ways, often within a single provision." 134 F.3d at 288-89 (citing 29 U.S.C. §§ 1441(a), 1341a(d) & 1342(d)(1)(A)(v); 29 C.F.R. § 2520.104b-4(a)(1)(iii)). From this the court reasoned that to interpret the prohibition in the anti-cutback rule against amendments that reduce benefits as applying to suspensions would "make the word 'suspension' redundant in all of these statutory provisions and interpretive regulations." *Spacek*, 134 F.3d at 289. This redundancy, according to *Spacek*, would violate the canon of statutory construction that every word in a statute must be given meaning. *Id.*

We disagree with the inference that *Spacek* draws from the various provisions that refer to both reductions and suspensions. Our interpretation of the anti-cutback rule does not suggest that *all* suspensions are "reductions" (or vice versa), only that *if* the suspension is pursuant to an amendment that reduces benefits (attributable to service before the amendment), then it is a reduction within the anti-cutback rule. This interpretation does not render the word "suspension" in the other provisions redundant.

For example, *Spacek* relies on various provisions in Title IV of ERISA (relating to financially troubled and terminated plans) that refer to both "reduction of benefits" and "suspension of benefit payments"; according to *Spacek*, to avoid redundancy, the former phrase must be construed as excluding the latter. *Id.* But *Spacek*'s identification of the two relevant phrases is too narrow; to the extent the Title IV

provisions identify two separate categories, they are *amendments that reduce benefits* on the one hand, and *suspension of benefit payments*, on the other. Section 1441, governing plan terminations, is typical:

> (a) Amendment of plan by plan sponsor to reduce benefits, and suspension of benefit payments
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> Notwithstanding sections 1053 and 1054 of this title, the plan sponsor of a terminated multiemployer plan to which section 1341a(d) of this title applies shall *amend the plan to reduce benefits,* and shall *suspend benefit payments,* as required by this section.

29 U.S.C. § 1441(a) (emphasis added)[8]; *see also* 29 U.S.C. § 1425(a)(1) & 26 U.S.C. § 418D(a)(1) (plans in reorganization may amend the plan to reduce benefits); 29 U.S.C. § 1426(a) & 26 U.S.C. § 418E(a) (insolvent plans may suspend benefit payments); 29 U.S.C. § 1053(a)(3)(E)(ii) & 26 U.S.C. § 411(a)(3)(F) (exception to forfeiture rule for amendments that reduce benefits under §§ 1441 or 1425, and suspension of benefit payments under §§ 1441 and 1426). Because the latter category (*suspension of benefit payments*) includes suspensions *not* according to any amendment, as in the case of insolvent plans, for example, it is not rendered superfluous by interpreting the amendment in this case as falling into the former category (*amendments that reduce benefits*).[9]

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[8] The reference to reduction and suspension in § 1341a, also relied upon by the court in *Spacek, see* 134 F.3d at 289, is derivative of section 1441, directing plan sponsors to "reduce benefits and suspend benefit payments in accordance with section 1441 of this title." 29 U.S.C. § 1341a(d).

[9] The reference to reduction and suspension in 29 U.S.C. § 1301(a)(8), which defines "non-forfeitable benefit" in the context of termination insurance, is consistent with this analysis. It states that the definition applies "whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or the Internal Revenue Code of 1986." A

In other words, even crediting the reliability of any inference about the anti-cutback rule that can be drawn from the use of these phrases in various provisions relating to terminated or troubled plans, the most we can infer is that a suspension of benefit payments not falling into the first category—amendments that reduce benefits--should be excluded from the anti-cutback rule. But other than in the case of insolvent or terminated plans, an administrator's authority to suspend benefits must come from the plan. And as we noted before, no one is disputing that the suspension in this case would be proper if it were contained in the original plan. It is the propriety of the *amendment* to the plan that is at issue in this case, and not the suspension itself, and therefore we cannot infer from the distinction made in Title IV between suspensions of benefit payments and amendments that reduce benefits that the amendment in this case is beyond the anti-cutback rule.[10]

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suspension of benefits in the case of an insolvent plan would be a suspension "by operation of this chapter" and not a reduction "by plan amendment."

[10] The Fifth Circuit also relies on a Department of Labor regulation, 29 C.F.R. § 2520.104b-4(a)(1)(iii), which requires notice of plan provisions "under which the present benefit payment may be reduced, changed, terminated, forfeited or suspended." Under the Fifth Circuit's reasoning, this list of overlapping terms creates a whole host of redundancy problems unless we construe the list as creating mutually exclusive categories. But there is no need to do so to avoid redundancy because the term "suspended" has application outside the scope of the broader terms. For example, a suspension of benefits could be a forfeiture, but not always—as when the suspension is according to provisions in the plan meeting the requirements for post-retirement employment in § 29 U.S.C. 1053(a)(3)(B). Because a suspension will not always be a forfeiture, identification of the two concepts separately is not redundant, and there is no need to interpret the concept of forfeiture as excluding suspensions. The same is true for suspensions and reductions: a suspension will not always be a reduction in benefits, as when, for example, the suspension is according to the plan as originally conceived. The reference to suspensions in the notice regulation is therefore not rendered redundant by interpreting the amendment in this case as reducing benefits. (For the same reason, there is no redundancy in identifying suspensions and reductions separately in 29 U.S.C. § 1342 (trustee of terminated plan may "reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan . . .").)

We do not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary. Adding a reference to suspensions in § 1054(g)(1) (*e.g.*, "The accrued benefit of a participant under a plan may not be decreased [*or suspended*] by an amendment of the plan") or § 1054(g)(2) (*e.g.*, "a plan amendment which has the effect of . . . eliminating[,] reducing[, or *suspending*] an early retirement benefit . . ."), would be awkward and perhaps overbroad; it is not the *suspension* of benefit payments that offends the anti-cutback rule, but the change (to the detriment of the participant) in the conditions triggering the suspension, and this concept is adequately captured by the prohibition against amendments that reduce benefits.

2. Legislative history of the Retirement Equity Act.

The Fund, again relying on *Spacek*, also points to the legislative history of the Retirement Equity Act of 1984, which added paragraph (2)—the provision concerning amendments that reduce or eliminate early retirement benefits—to § 1054(g). *See Spacek*, 134 F.3d at 289-90. *Spacek* found instructive the following comment made by Representative William Clay during the final House debates on the Retirement Equity Act:

> Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B) and code section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the

> authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.

Spacek, 134 F.3d at 289 (quoting 130 Cong. Rec. 23,487 (1984)). The Fifth Circuit concluded that Representative Clay's remark means that the anti-cutback rule in § 1054(g) does not limit the power of the plan to amend the plan to expand the restrictions on post-retirement employment. *See Spacek*, 134 F.3d at 289-90.

We find Representative Clay's remark ambiguous at best on the question of whether amendments concerning suspensions for disqualifying employment are outside the coverage of § 1054(g).[11] But even if Representative Clay's understanding of the anti-cutback rule were consistent with the Fifth Circuit's—that suspensions upon disqualifying re-employment represent an additional exception to § 1054(g)—we find nothing in the legislative history to indicate that anyone else in Congress shared the understanding attributed to Representative Clay by the Fifth Circuit. The parties have not identified, and we have been unable to find, any further reference in the legislative history of the Retirement Equity Act to the exception for suspensions that the Fifth Circuit infers from Representative Clay's

[11] It is not self-evident that Representative Clay's reference to "stricter rules" means rules that are "more strict than before the plan amendment." It could also mean that the new provision was not intended to affect the existing authorization for multiemployer plans to impose rules relating to suspensions of early retirement benefits that are stricter than those authorized for benefits commencing at normal retirement age, which must conform to the limits in § 203(a)(3)(B). *See* 29 C.F.R. § 2530.203-3(a). Similarly, Representative Clay's comment that the new provision will not affect the ERISA provisions that impose limits on the conditions a plan may place on post-retirement employment could mean simply that the new provision does not address those conditions substantively; it does not necessarily mean he believed that an amendment changing those conditions was outside the anti-cutback rule.

remarks.[12] The absence of any additional support in the legislative history suggests to us that the Fifth Circuit gave undue weight to the statement of Representative Clay, which (as interpreted by the Fifth Circuit) is at odds with the straightforward language of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941, 953-54, 151 L.Ed.2d 908 (2002) (rejecting interpretation contained in the floor statements of the statute's sponsors); *Monterey Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 743 F.2d 589, 596 (7th Cir.1984) (same); *Alex v. City of Chicago*, 29 F.3d 1235, 1239 n. 3 (7th Cir.1994) ("[I]solated remarks of individual legislators, . . . [can]not be used to find ambiguity, or contrary intent, in statutory language that, with respect to a case in hand, is clear on its own terms without rendering nugatory the 'plain meaning' canon of construction.").[13] Accordingly, we conclude that Representative Clay's remarks cannot be used to support an exception to the anti-cutback rule for amendments that expand disqualifying employment.

3. Treasury Regulation 26 C.F.R. § 1.411(c)-1(f).

The court in *Spacek* also found support in 26 C.F.R. § 1.411(c)-1(f), a Treasury Department regulation concerning the allocation of accrued benefits between employer and employee contributions. By way of background, the court first noted that the term "accrued benefit" means the employees' benefit as accrued under the plan, expressed in

[12] By contrast, both the House and the Senate Reports discuss the two exclusions specifically identified in § 1054(g)—for cases of substantial business hardship and for terminated multi-employer plans. *See* H.R.Rep. No. 98-655, pt. 2, at 27 (1984); S.Rep. No. 98-575, at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

[13] Moreover, Representative Clay's statement, on August 9, 1984, was made three days after the Senate had passed the bill, on August 6, 1984, see P.L. 98-397, further undermining its reliability as evidence of Congress's intent. *See Sigmon Coal Co.*, 122 S.Ct. at 954 n. 15; *Monterey Coal Co.*, 743 F.2d at 597.

the form of "an annual benefit commencing at normal retirement age," 29 U.S.C. § 1002(23),[14] or, for early retirement benefits, the actuarial equivalent of the benefit commencing at normal retirement age. *See Spacek,* 134 F.3d at 290 (citing 29 U.S.C. § 1054(c)(3); 26 C.F.R. § 1.411(c)-1(e)).[15] The Treasury regulation relied upon by *Spacek,* 26 C.F.R. § 1.411(c)-1(f)(1), states that in calculating the actuarial equivalent of an accrued benefit, "[n]o adjustment . . . is required on account of any suspension of benefits" if the suspension is permitted under ERISA § 203(a)(3)(B)—the section dealing with restrictions on post-retirement employment.[16] According to the Fifth Circuit, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit," an amendment "authorizing such a suspension does not serve to decrease the participant's accrued benefits, and thus cannot violate § 1054(g)." 134 F.3d at 291.

This reasoning, however, is inconsistent with the language of paragraph (2) of § 1054(g), which provides that an amendment that has the effect of eliminating or reducing early retirement benefits shall, for purposes of § 1054(g), "be *treated* as reducing accrued benefits." 29 U.S.C.

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[14] The term "accrued benefit" means[,] in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age . . . . 29 U.S.C. § 1002(23).

[15] [I]f an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit . . . . 29 U.S.C. § 1054(c)(3).

[16] No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) . . . . 26 C.F.R. § 1.411(c)-1(f)(1).

§ 1054(g)(2), ERISA § 204(g)(2) (emphasis added); *see Ahng*, 96 F.3d at 1036; *Bellas*, 221 F.3d at 523. Whether a benefit is "accrued" for other purposes under ERISA is irrelevant for purposes of § 1054(g)(2). *See Costantino v. TRW, Inc.*, 13 F.3d 969, 979-80 (6th Cir.1994) ("There is no inconsistency between Defendant's claim that the definition of 'accrued benefits' excludes [retirement-type] subsidies, and the [Retirement Equity Act's] strategy of protecting subsidies by treating them as 'accrued benefits' in several provisions."); *Bellas*, 221 F.3d at 523 ("While the definition of an accrued benefit has not been modified, Congress did modify section 204(g) in 1984 to the end that early retirement benefits and retirement-type subsidies were defined as being accrued for purposes of ERISA's anti-cutback provisions."). In fact, it was on this basis that we overruled our earlier decision in *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1359-60 (7th Cir.1993), which held that an amendment reducing early retirement benefits did not violate § 1054(g) because the benefits were not accrued benefits as defined under 29 U.S.C. § 1002(23). *See Ahng*, 96 F.3d at 1036-37. The portion of the regulation relied upon by the court in *Spacek*, like the general definition of accrued benefits relied on in *Meredith*, is simply irrelevant to our determination of the scope of § 1054(g)(2), which treats amendments that reduce early retirement benefits as reducing accrued benefits.

The Fifth Circuit reasoned, however, that because the amendment would not decrease "accrued benefits," then the amendment could not violate the anti- cutback rule as applied to full retirement benefits, because for those benefits, the prohibition is limited to amendments that decrease "accrued benefits." *See* 134 F.3d at 291. According to *Spacek*, applying the anti-cutback rule to amendments governing suspension of early retirement benefits would therefore give early retirement benefits greater protection than full retirement benefits, which is contrary to Congress's intent that early retirement benefits receive the same protection as

full retirement benefits. *Id.* But *Spacek's* observation about Congress's intent cuts both ways. The question is, same as what? Other than perhaps the remarks of Representative Clay (reliance on which, as we just discussed, is problematic), there is nothing in the legislative history of the Retirement Equity Act to suggest that Congress had any specific understanding about whether amendments affecting suspensions of full or early retirement benefits would be covered. And we disagree with *Spacek's* key premise—that for full retirement benefits, 26 C.F.R. § 1.411(c)-1(f) means that an amendment expanding the conditions triggering a suspension would not be covered by the anti-cutback rule.

As *Spacek* points out, the regulation instructs that in calculating the accrued benefit, no actuarial adjustment need be made to account for the decrease in total benefits paid as a result of the suspension. *See* 134 F.3d at 290. This is consistent with ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B), which states that a suspension for certain post-retirement employment is not a forfeiture. But it does not necessarily follow that, because no actuarial adjustment is required, an amendment concerning suspensions cannot decrease accrued benefits. To say that a *suspension* is not a forfeiture (or does not decrease accrued benefits) is not the same as saying that a *change* in the rules governing suspensions cannot decrease accrued benefits. In other words, we can conclude from the regulation that a pre-existing plan provision suspending benefit payments would not decrease accrued benefits; the regulation says nothing, however, about a *change* in the rules regarding suspensions. And if we view "accrued benefits" as including the conditions on receiving those benefits, then the *amendment,* by increasing those conditions, decreases accrued benefits. *Spacek's* logic therefore depends on interpreting the term "accrued benefits" as including only the periodic payment, but excluding the conditions affecting the participant's ability to receive that amount. There is nothing in the statutory definition that compels this interpretation, and

we are persuaded that our interpretation is closer to ERISA's purpose of protecting anticipated benefits. *See generally Hickey*, 980 F.2d at 468 ("ERISA protects the benefits described in the Plan by ensuring that, if a pensioner is promised a benefit and fulfills the conditions required to receive it, the pensioner will actually receive the described and promised benefit."); LANGBEIN & WOLK, *supra*, at 121-22.

Another regulation, moreover, supports our conclusion that *Spacek's* construction is too narrow. That regulation, 26 C.F.R. § 1.411(d)-4, which contains the Treasury Department's interpretation of 26 U.S.C. § 411(d)(6) (the counterpart of the anti-cutback rule in the Internal Revenue Code), interprets the anti-cutback rule as applying to amendments that impose further restrictions or increase the conditions affecting benefits that have already accrued. The regulation begins by defining "section 411(d)(6) protected benefits" as including any benefit that is described in 26 U.S.C. §§ 411(d)(6)(A) & (B) (the counterpart in the Internal Revenue Code of the anti-cutback rule in 29 U.S.C. § 1054(g)). 26 C.F.R. § 1-411(d)-4 Q & A-1. It then provides that:

> The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6).

26 C.F.R. 1.411(d)-4 Q & A-7.

The section of the anti-cutback rule dealing with early retirement benefits does not limit the prohibition to a decrease in "accrued benefits," but rather says that an amendment that "has the effect of—eliminating or reducing" benefits will

"be treated as reducing accrued benefits." 29 U.S.C. § 1054(g)(2). Reading this language to include an amendment increasing conditions is straightforward, and we decline to abandon this plain reading in favor of the Fifth Circuit's interpretation of the term "accrued benefits," which is neither compelled by the statutory definition nor supported by legislative history or other persuasive authority.[17]

III. CONCLUSION

Nothing in ERISA, the legislative history of the Retirement Equity Act, or the Treasury regulation relied upon by the

---

[17] One final point: in conducting our research we encountered a sentence in the current Internal Revenue Manual addressing the question posed in this case. The manual states that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)." Internal Revenue Manual 4.72.14.3.5.3(7) (available on WESTLAW RIA-IRM database). This statement does not settle the matter, however. An agency manual is generally entitled only to whatever deference is due based on its persuasiveness. *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Matz v. Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572, 575 (7th Cir.2001). The single statement in the manual does not tell us anything about the thoroughness of the agency's analysis or the validity of its reasoning, and we have no basis to conclude that it represents a long-standing agency interpretation. *Compare Barnhart v. Walton*, ___ U.S. ___, ___, 122 S.Ct. 1265, 1270, 152 L.Ed.2d 330 (2002). Furthermore, the manual, although it supports the outcome in *Spacek*, does not support its logic. *Spacek* reasoned that amendments affecting suspensions cannot violate the anti-cutback rule because they cannot reduce accrued benefits. 134 F.3d at 291. The premise of the statement in the manual, however, is that such an amendment "reduces I.R.C. 411(d)(6) protected benefits." To characterize an amendment as "reducing I.R.C. 411(d)(6) protected benefits" is to admit that the amendment is within the anti-cutback rule of I.R.C. § 411(d)(6) (and its counterpart in 29 U.S.C. § 1054(g)). The manual's conclusion that such an amendment does not violate the anti-cutback rule is at odds with the plain language of the statute, even as interpreted by *Spacek*, and without any explanation of its rationale, must be rejected as unpersuasive.

court in *Spacek* persuades us to depart from our conclusion that 29 U.S.C. § 1054(g) unambiguously applies to the amendment in this case, which reduced plaintiffs' early retirement benefits by expanding the conditions triggering a suspension of benefit payments. Because our interpretation of § 1054(g) resolves this appeal, we need not reach the plaintiffs' alternative argument that the Fund trustees' interpretation of the amendment's definition of disqualifying employment to include supervisory work was arbitrary and capricious. The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings.

CUDAHY, *Circuit Judge*, dissenting.

Judge Williams for the majority has labored with great skill and ingenuity to overcome the efforts of Chief Judge Caroline Dineen King for a Fifth Circuit panel that came out the other way. *See Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998). Though Judge Williams has put as persuasive a face as may be possible on the majority's position, I still find *Spacek* quite compelling. *Spacek*, it seems to me, presents straightforward and plausible arguments, not susceptible to rebuttal by the sometimes tortured contentions of the majority.

The first pillar supporting the outcome in *Spacek* is the absence of the word "suspend" or its variants from 29 U.S.C. § 1054(g), the anti-cutback rule.[1] Yet "suspend" or its variants appear side-by-side with "reduce" or its variants in numerous other sections of ERISA. If, as the majority argues, the concept of reduction includes suspension, then the use of "suspend" or its variants, in addition to "reduce" or its variants, in many other ERISA sections is redundant. There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so. I find this plain meaning argument to be quite convincing.

The majority attempts to rebut this argument with two points. First, it seems to say that a "suspension" is really a "reduction" because over time a "suspension" of the receipt

[1] Section 1054(g)(2) also prohibits the *elimination* of benefits but the majority, and the parties on appeal, mainly deal with the prohibition against the *reduction* of benefits. Thus, I restrict my analysis to whether a suspension is a reduction of benefits. In any event, there is no elimination of benefits in this case. While it is true that a plan participant will not receive pension payments when he or she is engaged in disqualifying work, the entitlement to pension payments is only temporarily lost and not eliminated. The participant will receive pension payments again when the disqualifying work is finished.

of a benefit reduces the economic value of the total benefits received. Op. at 806. Of course, there is an economic loss from a suspension; if there were none, there would be no lawsuit. But, that does not mean that, as used in ERISA, a "suspension" is exactly equivalent to a "reduction" or is included within it. From the point of view of the recipient on the facts before us, the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income derived, as was the pension, from the very same construction industry. This elimination of "double-dipping" from the construction industry's pockets seems substantially more equitable, and is certainly less burdensome to the pension recipient, than would be a reduction in the amount of the benefit unsupplemented by earned income. Hence, the broadening of the ban on "double-dipping" seems not inequitable.

Second, the majority attempts to dismiss the argument from redundancy based on the numerous ERISA provisions that contain both the words "reduction" and "suspension" by distinguishing those provisions as involving matters other than an amendment purporting to diminish benefits. Op. at 807-808. Thus, the majority apparently concludes that if a suspension is pursuant to an amendment that diminishes benefits, then the suspension *is* a reduction of benefits. Op. at 807-808. On the other hand, if a suspension is not pursuant to such an amendment, then, the majority concludes, it *is not* a reduction of benefits. *Id.* I do not follow this logic. While there may be more than one means of invoking a suspension, what constitutes a suspension--the meaning or definition of a suspension--should not change because the suspension was achieved by one method instead of by another method.

The majority's subsequent argument that § 1054(g) concerns only amendments and thus it only bars suspensions pursuant to an amendment, Op. at 809, only makes sense if a suspension is a reduction of benefits. But, beside the

majority's ipse dixit, there is nothing to indicate that a suspension of benefits is a reduction of benefits as those terms are used in ERISA. Rather, as the analysis of Treasury Regulation 26 C.F.R. § 1.411(c)-1(f), discussed *infra*, concludes, a suspension is not a reduction of benefits based on ERISA's mode of calculating accrued benefits.

The legislative history involving the clear comments of Representative Clay firmly supports the interpretation based on plain meaning. The effort of the majority to explain away this comment is unconvincing. The comment appears to reflect an understanding at the time of the adoption of the anti-cutback rule that it not apply to adjustments made by the plan (perhaps in the interest of the plan's financial integrity) to the rules involving suspension of benefits in the event of re-employment in the construction industry. With respect to the arguments of the majority depreciating the use of legislative history in general, these arguments become less weighty in the case of legislative history that fits so closely with the interpretation founded on plain meaning.

The plain meaning is also supported by the Internal Revenue Manual described by the majority in its footnote 17. Again, this bit of authority fits neatly into the interpretation derived from plain meaning. It is, therefore, hard to explain away.

That *Spacek*'s interpretation reflects the plain meaning of the statute is supported by the outcome in *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir.1995). In *Whisman*, the appellant had qualified for a "'30-and-Out' pension benefit, which [was] available to participants with thirty years of service, regardless of age." *Id.* at 1143. He received $1,000 per month under the "30-and-Out" provision until he began working for the United States Postal Service in 1986, at which time, his pension benefit was suspended under the Plan's re-employment provision. *Id.* The Sixth Circuit held that the re-employment provision, which suspends early

retirement benefits if the participant is engaged in prohibited employment, was not contrary to the law. *Id.* at 1146-47 (citing *Gardner v. Central States, Southeast & Southwest Areas Pension Fund*, No. 93-3070, 1993 WL 533540 (6th Cir. Dec.21, 1993) (per curiam)). The court then dealt with Whisman's argument invoking the anti-cutback rule of ERISA.

> Whisman counters that *Gardner* is inapplicable because at the time Whisman applied and qualified for pension benefits, [the reemployment provision], adopted in 1987, was not in effect. According to Whisman, the application of the amended reemployment provision violates the principle of *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir.1994). We disagree. In *Costantino*, this Court held that a plan's attempt to eliminate early retirement subsidies for retirees that had already qualified for the subsidy prior to plan amendment violates the anticutback rules of ERISA and the Tax Code. *Costantino* is based upon an application and enforcement of section 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from amending their pension plan to decrease or eliminate early retirement benefits or retirement type subsidies. Even assuming that the "30-and-Out" benefit contains an early retirement subsidy, Whisman's argument is unpersuasive, because § 1054(g) and *Costantino* involve *a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension,* as is the case here.

Whisman, 55 F.3d at 1147 (emphasis added and footnote omitted). The court went on to conclude that Whisman would have lost even under the unamended plan. *Id.* While the majority dismisses *Whisman* as reaching its conclusion without analysis, perhaps the *Whisman* court thought that its conclusion was obvious from the plain meaning of § 1054(g).

The majority also seeks to rebut *Spacek*'s reliance on Treasury Regulation 26 C.F.R. § 1.411(c)-1(f) to establish that *normal* retirement benefits are not protected against suspension by amendment. The point *Spacek* makes is that, if normal retirement benefits are not protected, it is most unlikely that early retirement benefits would be protected.

Initially, to gain some perspective on the status of early retirement benefits in relation to normal retirement benefits, one should recognize that early retirees—here only 39 years old—would be much more likely to go back to work in construction than people normally retiring in their sixties. Hence, it would not be at all surprising that "double-dipping" by early retirees would, perhaps for reasons of the financial integrity of the plan, be dealt with more severely (and certainly not less severely) than would re-employment in the industry by workers retiring at a normal (and relatively advanced) age.[2] It would appear more likely that normal retirees would be allowed to retain their pension payments than would early retirees.[3] So one might logically expect

[2] The exceptions in the anti-cutback rule, permitting an amendment that decreases accrued benefits in the cases of "substantial business hardship" or termination of a pension plan, deal more with business problems facing the firm sponsoring the plan and not the internal financial integrity of a plan that might be affected by "double-dipping" even in good economic times. Because suspensions do not decrease accrued benefits, *see infra* Op. at 816, ERISA allows plan administrators more flexibility in adjusting the provisions for suspensions to maintain the financial integrity of pension plans. Under the majority's approach that would limit the availability of adjustments in suspensions to "substantial business hardship" or termination of a plan, the plan administrator loses such flexibility.

[3] The significance of age in the policy of retirement systems towards retirees' receipt of earnings is exemplified by the rules of the Social Security system. Retired persons, aged 65 to 70, lose their benefits if their earned income exceeds a stipulated amount, but, after they reach age 70, they are allowed to keep all their earnings in addition to their benefits. *See* Soc. Sec. Admin. Pub. No. 05-10069 (March 2002). One may surmise that pensioners are more likely to have significant earnings before age 70 than after.

employment restrictions on early retirees to be more onerous than those on normal retirees.

The Retirement Equity Act (REA), however, added the language of § 1054(g)(2), and, as *Spacek* states, "The legislative history of the REA indicates that the fundamental purpose behind the addition of paragraph (2) was to afford early retirement benefits and retirement-type subsidies the same form of protection from reduction by amendment afforded to accrued benefits." I am therefore in accord with *Spacek* 's conclusion that, if an amendment, such as the one at issue here, would not violate § 1054(g) if it were applied to suspend fully accrued benefits, it plainly cannot violate § 1054(g) if applied to early retirement benefits. *Spacek*, in reaching that conclusion, starts with the proposition from the applicable treasury regulation that, "for the purposes of computing the actuarial equivalent of a retirement benefit available at normal retirement age, '[n]o adjustment of any accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) of the Employment Retirement Income Security Act of 1974 [29 U.S.C. § 1053(a)(3)(B)].'" *Spacek*, 134 F.3d at 290 (quoting 26 C.F.R. § 1.411(c)-1(f)). Therefore, in figuring a plan participant's accrued benefit, where early retirement benefits are involved, the calculation of the accrued benefit need not account for the decrease in total benefits paid as a result of a suspension authorized by 29 U.S.C. § 1053(a)(3).

Spacek then notes the authorization under § 1053(a)(3)(B) of suspension of accrued benefits based on certain employment—as is the case here. At this point, *Spacek* goes on to conclude that an authorized suspension does not decrease accrued benefits. And, as earlier noted, to the extent that an

amendment would not violate the anti-cutback provision rule if applied to fully accrued benefits, such an amendment cannot, based on the demonstrated intent of Congress, violate the rule if applied to early retirement benefits. The logic here seems inescapable.

As far as I can divine, the majority's effort at refutation involves a simple attempt at bootstrapping. The majority says that the *Spacek* reasoning is inconsistent with the language of paragraph (2) of the anti-cutback rule, apparently because this provision requires that amendments that have the effect of eliminating or reducing early retirement benefits should be treated as reducing accrued benefits. Slip op. at 18. But, as has been demonstrated earlier, a "suspension" is not a "reduction" (although the majority would have it otherwise), and the alleged inconsistency therefore disappears. As far as I can determine, the remainder of the majority's argument involving accrued benefits continues to rely on the false equation of "suspension" with "reduction."

The majority also adds the point that, even though a suspension of benefit payments may not decrease accrued benefits (or become a forfeiture), a change in the rules governing suspensions may indeed decrease benefits. Slip op. at 20. This argument misses the mark because the provisions we are discussing are directed to what is permissible for *changes* in the plan. To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension.

The majority's reliance on 26 C.F.R. § 1.411(d)-4 interpreting 26 U.S.C. § 411(d)(6), an analogous anti-cutback rule in the Internal Revenue Code, is also unconvincing. Nothing in this regulation refers to a suspension or anything resembling a suspension. The majority seems to be arguing that the amendment under consideration here had something to do

with "increasing conditions." But there is no indication that anything in the cited regulation is relevant to the conditions of a suspension. Rather, the bar against "increasing conditions" appears to be a bar against increasing eligibility requirements for pension participation. *See* 26 C.F.R. § 1.411(d)-4 Q & A-6 (asking and answering whether a plan may "condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan"). We have already held that a change in eligibility requirements could violate the anti-cutback rule. *See Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036-37 (7th Cir. 1996) (so holding). But the Internal Revenue Manual discussed in footnote 17 of the majority opinion states unequivocally that an amendment pursuant to ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B), suspending benefits payments for periods of employment, as here, does not violate the anti-cutback rule of § 411(d)(6). The majority has nothing better to point out in refutation than a clumsy use of words in drafting some of the provisions of the manual. The intent of the manual provision, on the other hand, seems clear.

Spacek's analysis relies on straightforward interpretations of statutory and regulatory language. The majority seeks to refute it with implausible and unconvincing arguments that do violence to the clear intent of the drafters.

As to considerations of policy and equity, it is true that my analysis may result in defeating in some instances the expectations of the plan participants. But this seems acceptable if they withdraw from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired.

I therefore respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

[Filed Aug. 9, 2000]

Case Number: 99-1388

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,

v.

CENTRAL LABORERS' PENSION FUND

JUDGMENT IN A CIVIL CASE

☒ DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiffs.

ENTER this 9th day of August, 2000

/s/ John M. Waters
JOHN M. WATERS, CLERK

/s/ [Illegible]
BY: DEPUTY CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: 99-1388

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.
Plaintiff,

vs.

CENTRAL LABORERS PENSION,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiffs.

In compliance with the view of the Court that a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is more appropriate than summary judgment where there are no factual issues created by the pleadings, before the Court are cross-motions of the parties for judgment on the pleadings. To the extent either party has presented matters outside the pleadings, the motion of that party is treated as one for summary judgment. This is a two-pronged ERISA claim by Plaintiffs to recover service pension (early retirement) benefits which were suspended by Defendant, Central Laborers' Pension Fund[1] ("the Fund") when Plaintiffs became reemployed in the construction

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[1] The Fund is a multi-employer pension fund whose participants are primarily laborers in the construction industry.

industry in non-union supervisory positions. Plaintiffs claim that the suspension of their pension benefits was (1) in violation of section 204(g) of ERISA, 29 U.S.C. § 1054(g), known as the anti-cutback rule; and (2) that the determination by the Fund that the suspension of benefits was allowed by the 1998 Amendments to the Plan was arbitrary and capricious.

* * * *

BACKGROUND

The material facts are not in dispute. Plaintiff Thomas E. Heinz began his retirement on January 1, 1996, at age 39½ years; and Plaintiff Richard J. Schmitt, Jr. on December 1, 1996, at age 39. They both had applied for and received a 30 credit service pension pursuant to the terms of the Plan administered by the Fund. However, the Plan provided that if early retirees engage in "disqualifying employment" before reaching normal retirement age, pension benefits would be suspended. Under the Plan's provisions, employment that was considered "disqualifying employment" varied depending on the retiree's age at the time of the reemployment. At the time Plaintiffs began their retirement, the relevant Plan language was construed to allow retirees under age 60 to work 39 hours in the construction industry, including work in a supervisory position without such work being considered "disqualifying employment."

At the time of their retirement, the relevant plan language found in Plan section 6.7(b) defined "disqualifying employment" as follows:

> Employment with an employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

On October 1, 1998, Section 6.7(b) of the Plan was amended to read as follows:

> (b) For employees who initially retired prior to October 1, 1998, disqualifying employment shall be defined as follows:
>
> (1) Initially retired prior to the participant's 53rd birthday, Disqualifying Employment is either:
>
> (i) Employment with an Employer in any capacity in the construction industry (either as union or non-union construction worker).

Subsequent to the October 1, 1998 Amendments, upon being advised that Plaintiffs were each employed in a non-union supervisory capacity by their respective employers in the construction industry, the Fund suspended Plaintiffs' pension benefits effective February 1, 1999.

ANALYSIS

A. Anti-Cutback Theory

This prong of Plaintiffs' ERISA claim depends upon the application of the anti-cutback provisions of section 204(g) to the suspension of early retirement pension benefits. Defendant argues that this section does not apply to early retirement pension benefits, relying upon a 1994 decision of our Court of Appeals in *Meredith v. Allsteel, Incorporated*, 11 F.3d 1354 (7th Cir. 1994), holding that early retirement benefits were not "accrued benefits" within the meaning of ERISA and thus were not protected from reduction by section 204(g). Unfortunately for Defendant, approximately two years later, *Meredith* was overruled by *Ahng v. Allsteel*, 96 F.3d 1033 (7th Cir. 1996). The *Ahng* panel confessed that in deciding *Meredith*, the court had overlooked the effect of the 1984 Retirement Equality Act amendment to section

204(g). This 1984 amendment to section 204(g) expressly addressed the question of whether early retirement benefits were "accrued benefits" and reads as follows:

> (g) Decrease of accrued benefits through amendment of a plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) *eliminating or reducing an early retirement benefit* or a retirement-type subsidy (as defined by regulations), or
>
> (B) eliminating an optional form of benefits with respect to benefits attributable to service before this amendment *shall be treated as reducing an accrued benefit*. (emphasis added)

In conforming Seventh Circuit jurisprudence in this area to that of the majority of other circuit courts of appeals, the court held "that employees like plaintiffs here who complain about a cutback of early retirement benefits have stated a claim under section 204(g), as long as each employee satisfies (either before or after the plan amendment) the relevant eligibility requirements in place at the time of the amendment." *Id*. at 1035.

Faced with the compelling force of *Ahng*, Defendant seeks to distinguish *Ahng* by limiting its holding to cases where early retirement benefits are terminated or reduced, not suspended as they are in the case at bar. In support, Defendant relies upon the Fifth Circuit's opinion in *Spacek v. Maritime Association*, 134 F.3d 283 (5th Cir. 1998) (where the pension plan at issue provided that if an early retiree is

reemployed in the same industry prior to his normal retirement age, any early retirement pension benefits could be suspended). In *Spacek*, the Plan and its trustees suspended payment of Spacek's early retirement benefits pursuant to a plan amendment adopted after he retired that changed the definition of "employment in the industry" by removing the requirement that participant receive one credit hour before early retirement benefits would be subject to suspension for reemployment.

The Fifth Circuit decided that suspension of benefit payments was not covered by section 204(g). This conclusion was supported by examples in both the wording of the ERISA statute and corresponding regulations where the concepts of reduction or termination of benefits and suspension of benefit payments are used in distinct ways, often within a single provision. The Court finds this reasoning persuasive and logical since interpreting "reduction of benefits as including suspension of benefit payments would make the word 'suspension' redundant in all of these statutory provisions and interpretive regulations." *Id*. at 289. As observed in *Spacek*, this construction would be "contrary to the rule of statutory construction that each word must be given meaning (citation omitted)." *Id*. at 289.

The Fifth Circuit also found support for the distinction made between reduction of benefits and suspension of benefit payments in the legislative history of the Retirement Equity Act of 1984 (REA) which amended section 204(g) to expressly apply the anti cutback rule to early retirement benefits. The court concluded that "the legislative history of the REA indicates that the fundamental purpose behind the addition of paragraph (2) to section 1054(g) was to afford early retirement benefits and retirement-type subsidies the same form of protection from reduction by amendment afforded to accrued benefits. Although the Court is skeptical of this over reaching conclusion, the Court does subscribe to the view expressed in *Spacek* that the legislative history

supports a distinction between "reduction of benefits" and suspension of benefit payments. In that regard, the Court is struck by the fact that, unlike a reduction in benefits situation, where benefits are suspended, the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment.

B. Arbitrary and Capricious Claim

In connection with Plaintiffs' claim that the Trust's interpretation and construction of the 1998 amendments to allow suspension of early retirement benefits was arbitrary and capricious, Plaintiffs rely upon "matters outside the pleadings" and pursuant to Rule 12(c), their motion is being treated as one for summary judgment. Here again the material facts are undisputed. The essence of Plaintiffs' theory is that both the 1996 and 1998 amendments of section 6.7(b) of the Plan use the identical explanatory phrase "(either as a union or non-union construction worker)." According to Plaintiffs, this phrase limits disqualifying employment in the construction industry to jobs as a "construction worker." Since Plaintiffs were employed in the construction industry as construction supervisors and not "construction workers," Plaintiffs assert they were not engaged in "disqualifying employment," and their pension benefits should not have been suspended. In support of this argument, Plaintiffs rely upon a letter from the Fund's counsel Jeffrey M. Wilday, ("Wilday letter") to The Segal Company, the Fund's actuary, approximately one year after the 1998 amendments. That letter states in pertinent part:

> An attorney for one of the recent claimants argued that the language in parentheses limits disqualifying employment in the construction industry to jobs as a 'construction worker.' Under his argument, the relevant question is not whether the participant is working in the construction industry but whether he is working as a 'construction worker', either union or non-union. Since this attorney's client was in a 'supervisory' capacity in the construction industry and not as a 'construction worker', he argued that the participant was not engaged in 'disqualifying employment'. Of course, the trustees' intent was to include <u>any</u> work in the construction industry as 'disqualifying employment' and the claim was denied, but a clarification of the language of the definition may be appropriate.

Plaintiffs argue that the Wilday letter agrees with their interpretation of the 1984 amendment and is an "admission against the Fund's interest and shows that its interpretation and application of the 1998 amendment was unreasonable." On the mistaken premise that the standard of review by this Court is "reasonableness," they claim a right to summary judgment in their favor. The concept of reasonableness is typically associated with the abuse of discretion standard. As explained in *Ross v. Indiana State Teachers Association Ins. Trust*, 159 F.3d 1001, 1008 (7th Cir. 1998):

> When the administrator is given discretion to interpret the terms of the plan, the "extent of the deference given the administrator 'determines the extent of judicial deference.'" *Cozzie*, 140 F.3d at 1107 (quoting *Morton v. Smith*, 91 F.3d 867, 870 (7th Cir. 1996)). This is the case because *Firestone Tire* "did not establish a single standard for reviewing the discretionary decision making of plan fiduciaries" but instead "presented a 'smorgasbord of possibilities' for standards of review." *Morton*, 91 F.3d at 870.
>
> In *Morton*, this court differentiated between the arbitrary and capricious standard of review and the abuse of discretion standard. We stated that when plan administrators are constrained to make 'reasonable' interpretations of a plan, 'their decisions are viewed according to the familiar abuse-of-discretion standard'. *Id.* In

> contrast, we explained, when the administrators need only 'interpret the plan under the broad standard of good faith, their discretion is even more extensive, and judicial review is even more deferential.' *Id.* In that case, the arbitrary and capricious standard applies.

First, the Court agrees with Defendant that Plaintiffs' argument that the Wilday letter constitutes an admission by the Trust that the Fund's interpretation and application of the 1998 amendment is unreasonable, has no basis in fact or law, and is without merit.

The parties seem to agree that unless the Trustee's interpretation and application of the language of the 1998 amendment is unreasonable, the Court must give the highest deference to the Fund's determination. Defendant cites *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1035 (7th Cir. 1990), and Plaintiffs cite *Ross v. Indiana State Teacher's Ass'n. Ins. Trust*, 159 F.3d 1001, 1009 (7th Cir. 1998).

It is long established in our circuit that where the Plan gives its administrators and/or fiduciaries the authority to construe the terms of the Plan, the "appropriate standard of review is whether the 'decision or conduct was arbitrary, capricious or motivated by bad faith' (citation omitted)." *Reilly v. Blue Cross & Blue Shield United of Wis.*, 846 F.2d 416, 419 (7th Cir. 1988). The more recent decision of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. (1989) leaves no doubt on the issue. There the court held that the "denial of benefits challenged under § 1132(a) (1) (B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary authority to determine eligibility for benefit or to construe the terms of the plan." In the latter situation, "the appropriate standard of review is 'arbitrary and capricious.'" *Id.* at 1035. In flushing out the analysis called for by the "arbitrary and capricious"

standard, our circuit has given us some guides in *Reilly v. Blue Cross*:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of [an ERISA fiduciary]. Nevertheless, the [fiduciary] must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . . Normally, [a decision by a fiduciary] would be arbitrary and capricious if the [fiduciary] relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of [its] expertise.

Our circuit court has taught that "the distinction between [the abuse of discretion and arbitrary and capricious standards] is indeed nebulous; [and] in fact we have (both before and since our decision in *Morton*) treated these standards of review as substantially equivalent." *Russ* at 1008. Regardless, this Court finds the arbitrary and capricious standard of review to be most appropriate in the case at bar. There is no dispute that the terms of the Plan gives the Trustees "discretionary authority to determine eligibility or to construe the terms of the Plan." However, such discretion is harnessed by the requirement that the exercise of their powers be in a "uniform nondiscriminatory manner." Section 6.3 of the Plan provides in relevant part:

> The Trustees shall, subject to the requirements of the law, be the sole judges of the standard of proof required

in any case and the application and interpretation of this Plan, and decisions of the Trustees shall final and binding on all parties.

Wherever in the Plan the Trustees are given discretionary powers, *the trustees shall exercise such powers in a uniform nondiscriminatory manner.* (emphasis added).

All questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with this Plan or its operation, whether as to any claim for benefits, as to the construction of the language of this Plan or any rules and regulations adopted by the Trustees, or as to any writing, decision, instrument or account in connection with the operation of the Plan or otherwise, shall be submitted to the Board of Trustees for decision. In the event a claim or benefits has been denied, no lawsuit or other action against the Fund or its Trustees may be filed until the matter has been submitted for review under the ERISA-mandated review procedure set within Section 6.4. The decision on review shall be binding upon all persons dealing with the Plan or claiming any benefit hereunder, except to the extent that such decision may be determined to be arbitrary or capricious by a court . . . .

It is helpful to compare side by side the 1996 and 1998 amendments.

1996 Amendment	1998 Amendment-
"Disqualifying Employment for the period before age 60 is employment with an employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker). [6:7(b) (I)]	For employees who initially retired prior to the participants 53rd birthday: "Disqualifying Employment" with an employer in any capacity in the construction industry (either as a union or non-union construction worker).

Plaintiffs' contention is that the phrase "(either as a union or non-union construction worker)" found in both the 1996 and 1998 amendments to section 6.7(b) of the Plan is critical to a proper interpretation of the 1998 amendment and that both amendments limit disqualifying employment to work as a "construction worker." This, they argue, is how the Trust interpreted the phrase under the 1996 amendment and to interpret it otherwise would be unreasonable. As put by Plaintiffs in their memorandum of law, citing *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 540 (7th Cir. 1996), "supervisors in management" have never been within the scope of a "collective bargaining agreement" (1996 amendment) and to construe them as such would not constitute an interpretation "in an ordinary and popular sense as would [be interpreted by] a person of average intelligence and experience."

The thrust of Plaintiffs' argument is that the decision of the Fund is not consistent with its past decisions in similar cases under the 1996 amendment to the Plan where

"disqualifying employment" was routinely interpreted to exclude supervisory positions in the construction industry. Defendant argues that the Fund's construction of the 1998 amendment to include as "disqualifying employment" a job in "any capacity in the construction industry" encompasses construction supervisors and is a reasonable interpretation.

The parties' focus on the factor of reasonableness is within our circuit's analytical framework in deciding the "arbitrary and capricious" issue, and the Court will accept this *modus operandi*. *See Reilly* at 420. Also see *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032 (7th Cir. 1990).

In deciding this issue of reasonableness, neither the Court nor the Fund, can ignore the Plan document, its *raisón d'etre,* and the insight it provides.

Section 1.6 of the Plan defines "employer" to be an "employer signatory to a collective bargaining agreement with the union requiring contributions to their Fund, an employer (including the union) signatory to any other agreement requiring contributions to this Fund, who in writing adopts and agrees to be bound by the terms of the Trust Agreement and such other persons considered an employer under the Trust Agreement." "Employee" is defined in section 1.8 as "an employee covered by a collective Bargaining Agreement or any written agreement requiring employer contributions on his behalf including such other persons who can be considered an employee under the Trust Agreement." Reading these definitions in context of Article 10 of the Plan dealing with "Non-Bargained Employees," it is clear that workers other than construction workers covered by a collective bargaining agreement are considered employees under the Plan. Section 10.2 defines a "non-bargained employee" as:

> a person who is employed by an employer and who is not covered by a collective Bargaining Agreement, but

> covered by another written agreement requiring Employer contributions on his or her behalf.

This general language is broad enough to cover workers in supervisory positions who may not be covered by a collective bargaining agreement.

Giving effect to all the provisions of the Plan, it is clear that any employee whose employer is making contributions to the Fund is the type of worker in the construction industry this Plan and Fund was meant to benefit. This was as true under the 1996 amendment as it was under the 1998 amendment. As pointed out by Plaintiffs in their brief, "supervisors have never been within the scope of a collective bargaining agreement" with the union; therefore, the defining phrase (either as a union or non-union construction worker) could very well refer to non-bargained employees which could include supervisors. Admittedly, leaving in the phrase "(whether as a union or non union construction worker)" creates some ambiguity and the possibility of differing interpretations. Plaintiffs proffer one interpretation and Defendant another. For reasons expressed, the Court finds that the Fund's interpretation is not unreasonable and its decision suspending Plaintiffs' pension benefits is not arbitrary and capricious. Consequently, Plaintiffs' motion for summary judgment is DENIED. Defendant's motion for judgment on the pleadings is ALLOWED. Defendant's pending motion for summary judgment is mooted by this Order. Case terminated.

Entered this 9th day of August, 2000.

/s/ Joe Billy McDade
Chief United States District Judge